IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 73-1406

DANIEL CHAPMAN and JACQUE STOCKMAN
Appellants,

vs.

BEN MEIER, Secretary of State for the
State of North Dakota,
Appellee

On Appeal from the United States District Court for the
District of North Dakota

APPELLANTS' BRIEF

JOHN D. KELLY
609½ First Avenue North
Post Office Box 1389
Fargo, North Dakota 58102
Counsel for Appellants

St. Louis Law Printing Co., Inc., 812 Olive Street 63101 314-231-1477

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OPINIONS BELOW

The Opinion of the Court below dated January 30, 1974, including the dissent by Judge Bright, is reported at 372 F.Supp. 371. The Opinion and dissent are also printed at pages A-1 through A-53 of the Appendix to the Jurisdictional Statement. The Opinion of the Court entered June 30, 1972, including the dissent by Judge Benson, is reported at 372 F.Supp. 363. The Opinion, including the dissent, is printed at pages A-57 through

A-67 of the Appendix to the Jurisdictional Statement. The Order of the Court filed May 22, 1972, has not been reported. The Order is printed at pages A-54 through A-56 of the Appendix to the Jurisdictional Statement. It has also been printed at pages A1 through A3 of the Appendix to the Motion to Affirm.

JURISDICTION

This is an injunctive action against the North Dakota Secretary of State. The action was initiated pursuant to 28 U.S.C. §§ 1331, 1343, and 2281.

The Judgment appealed from is dated and was entered on January 30, 1974. Notice of Appeal was filed on February 27, 1974, in the United States District Court for the District of North Dakota. Appellants believe 28 U.S.C. § 1253 confers jurisdiction on this Court.

The Judgment appealed from is a final one establishing a permanent apportionment plan for the North Dakota Legislature based on the 1970 census. The Judgment denies plaintiffs the injunctive relief sought under their Amended Complaint. Plaintiffs contend that the Court-fashioned reapportionment plan adopted by the Judgment appealed from is Constitutionally deficient and in conflict with the directive by this Court relating to single-member legislative districting.

Appellants' Jurisdictional Statement was filed March 20, 1974. Jurisdiction was noted by this Court on April 29, 1974.

CONSTITUTIONAL PROVISIONS INVOLVED

Fourteenth Amendment to the Constitution of the United States.

QUESTIONS PRESENTED

1. In the absence of unique factors as in *Mahan v. Howell*, 410 U.S. 315, 333, and without any established state policy supporting multiple-member legislative districts as in *Whitcomb v. Chavis*, 403 U.S. 124, was the District Court free to ignore the general rule concerning the creation of multi-member legislative districts as set out in *Connor v. Johnson*, 402 U.S. 690, in fashioning a reapportionment plan for the North Dakota Legislature?

2. Do the disparities in population among legislative districts under the Court-fashioned reapportionment plan for the North Dakota Legislature establish a per se violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution? If not, did the District Court enjoy the same latitude and discretion as is afforded state legislatures under *Mahan v. Howell*, 410 U.S. 315, in adopting reapportionment plans containing population disparities among legislative districts, or is the Court held to a stricter standard?

STATEMENT

In 1964, on the basis of *Reynolds v. Sims*, 377 U.S. 533, a three-member District Court rejected a 1963 North Dakota legislative apportionment plan. The Court also voided Sections 26, 29, and 35 of the North Dakota Constitution upon which the plan was based. *Paulson v. Meier*, 232 F.Supp. 183 (hereinafter *Paulson I*). In 1965, the same three-member Court invalidated a new plan adopted by the North Dakota Legislature because of impermissible population disparities and ordered into effect a plan designed by the Court based upon the 1960 census. Among other things, this plan created five (5) large multi-member senator and representative districts. *Paulson v. Meier*, 246 F.Supp. 36 (hereinafter *Paulson II*).

Upon the failure of the North Dakota Legislative Assembly to apportion itself on the basis of the 1970 census, this action was commenced in November of 1971 seeking a determination that the *Paulson II* plan was no longer valid under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and asking that the defendant be restrained and enjoined from administering the laws pertaining to the elections of members of the North Dakota Legislature under the *Paulson II* plan. Plaintiffs requested the Court to design a constitutionally valid reapportionment plan that would provide for single-member districts in accordance with the rule promulgated by the United States Supreme Court in *Connor v. Johnson*, 402 U.S. 690.

By Order of May 22, 1972, the *Paulson II* plan was stricken as failing to meet Federal Constitutional standards. The Court appointed a commission to prepare a plan that could be utilized at the 1972 primary and general elections. Concerning the question of multi-member districts, the Order said:

> "We have considered the matter of 'multi-member' districts and conclude there is insufficient time prior to the 1972 elections to fully explore and resolve the issues involved. The matter of 'multi-member' districts will be studied in depth by the Commission, and the results of that study be made available to us." (See pp. A-54-A-56, Appendix to Jurisdictional Statement.)

By Opinion and Order filed June 30, 1972, an interim plan was adopted (hereinafter "Dobson Plan"). Defendant Meier was directed to conduct only the 1972 elections under the plan. The Court retained jurisdiction to adopt a permanent plan following the 1972 elections.

Concerning the issue of multi-member districts, the majority stated:

"We briefly comment on the continuation of the five multi-member senatorial districts in which are located the cities of Fargo, Grand Forks, Minot, Bismarck, and Jamestown. In the most populous 21st district, encompassing the Fargo area, voters may be called upon to elect fifteen members of the legislative assembly to represent that district, five to serve in the Senate and ten to serve in the House of Representatives. In each of the other multi-member districts, the electors may also be called upon to elect a substantial number of representatives at a single election. If each of the major political parties endorses a full slate of candidates, the electorate in the largest multi-member district could be called upon to judge the qualifications of at least thirty candidates for state legislative office. In such circumstances, the task confronting a voter in making a considered choice among individual candidates would appear to be most formidable.

"The five multi-member legislative districts were created by the Federal District Court in Paulson v. Meier, 246 F.Supp. 36 (D. N.D. 1965), and not by enactment of the Legislative Assembly. In light of subsequent Supreme Court pronouncements, we believe it would be improper for this Court to permit their continuation in a court-fashioned plan. In Connor v. Johnson, 402 U.S. 690 (1971), the Court stated:

> '• • • (W)hen district courts are asked to fashion apportionment plans, single-member districts are preferable to large multi-member districts as a general matter. Id. at 692.'

The Supreme Court subsequently re-emphasized this ruling in Connor v. Williams, 404 U.S. 549, 551 (Jan. 24, 1972). We feel constrained to permit multi-member districts to continue during the 1972 elections, however to avoid extreme disruptions in the elective processes. We

recognize that political party organizational structure has been formed, for elections subsequent to the 1965 apportionment decision, along legislative district lines. *See generally* Ch. 16-17 NDCC. We recognize that it takes considerable time for members of a political party to organize and operate effectively for the benefit of the electorate, following a change in district boundaries. We think it inappropriate, therefore, to change the method of selecting the members of the legislative assembly in these multi-member districts at this late date in light of the confusion which such a change would likely precipitate. We feel that the electorate will be better served by minimizing the confusion surrounding the impending elections, than it would be by the abolition of multi-member districts at this eleventh hour." (Author's emphasis.) 372 F.Supp. 363, 366.

Relative to population disparities among legislative districts, the majority noted:

> "We recognize certain weaknesses in the Dobson Plan, namely, (1) some variance in population among the legislative districts, which, in a few instances, seems substantial; * * *" 372 F.Supp. 363, 366.

Because of infirmities in the Dobson Plan, the Court retained jurisdiction of the case in order to adopt a different plan of reapportionment without being hampered by considerations of the impending elections.

Contrary to the June 30, 1972, Memorandum Opinion and Order, a reconstituted majority of the District Court issued an Opinion on January 30, 1974, making permanent the 1972 interim Dobson Plan, which included five (5) multi-member districts containing up to fifteen (15) members, as well as providing for legislative districts with population disparities of more than twenty per cent (20%). See *Chapman v. Meier*, 372 F.Supp. 371.

SUMMARY OF ARGUMENT

Multi-Member Districts

Recognizing the inherent inequities in large multi-member legislative districts, the United States Supreme Court, in *Connor v. Johnson*, 402 U.S. 690, directed that as a general rule when District Courts are required to fashion reapportionment plans they should do so on the basis of single-member districts. The State of North Dakota has neither Constitutional provisions nor statutory enactments that conflict with the equitable remedy of single-member districts. There are no unique factors that justify the imposition of large multi-member districts for the urban areas of North Dakota. Traditionally North Dakota has selected its state senators from single-member districts. The plan fashioned by the United States District Court for the District of North Dakota includes five (5) large multi-member districts containing up to fifteen (15) members and involving both houses of the state legislature. The imposition of large multi-member districts for North Dakota's urban areas under the Court-fashioned reapportionment plan based on the 1970 census is arbitrary and constitutes a breach of discretion by the District Court.

Population Variances Between Districts

The population disparity between the largest and the smallest legislative district, under the Court-approved Dobson Plan of reapportionment for the North Dakota Legislature, is more than twenty per cent (20%) or a deviation ratio of 1.23-1. Numerous other districts contain substantial variances, both on a percentage and ratio basis. There are no natural geographical barriers that justify the population deviations among the legislative districts. The guiding principle of equal representation mandated by the Fourteenth Amendment of the United States Constitution has been discarded by the District Court.

Population deviations are beyond permissible Constitutional limits; and the Dobson Plan per se offends the Equal Protection Clause.

Population disparities among legislative districts are not incident to the effectuation of any discernible state policy, Constitutional or statutory. The fact that North Dakota is sparsely settled and is "barren" of electorally victimized minorities provides no support for imposition of the Dobson Plan. The basic doctrine of "one man, one vote" promulgated under *Reynolds v. Sims*, 377 U.S. 533 (1964), and reapportionment cases subsequent thereto was not principally formulated for the protection of electorally victimized minorities. Rather, by assuring each citizen equal voting power, it is designed to assure that the voting majority will not be victimized by a minority whose votes are accorded greater weight.

Absent unique factors or established state policies justifying limited population variances, a District Court, in fashioning a reapportionment plan, must do so upon the standard of a good-faith effort to achieve absolute population equality among the legislative districts.

ARGUMENT

Multi-Member Districts

In the face of *Connor v. Johnson*, 402 U.S. 690 (1971), the District Court refused to establish single-member legislative districts in adopting a permanent apportionment plan for the North Dakota Legislature. The majority justified their refusal in these words:

> "The issue of multi-member districts or single-member districts is clearly a political issue to be resolved by the electorate and the legislature. In devising a plan, this Court will go no further than is required to formulate a constitutionally sufficient apportionment plan for the State of North Dakota, and will not intrude on the political realm." 372 F.Supp. 371, 377.

Connor v. Johnson was discarded as a racial discrimination case; and the majority enumerated decisions by this Court subsequent thereto as justifying its holding.

Since statehood and until 1965, North Dakota had a clearly articulated state Constitutional policy requiring single-member state senate districts (See Section 29 of North Dakota Constitution, Original and 1960 Amendment, p. 23, Single Appendix). Respondent, in his Motion to Affirm, suggests that the policy of single-senator districts was part and parcel of a "little federal system." That contention is inaccurate in the extreme. Originally, Section 29 of the Constitution of North Dakota mandated that senatorial districts ". . . as nearly as may be, shall be equal to each other in the number of inhabitants entitled to representation." The only impediment to absolute equality of population among senate districts was the restriction that ". . . no portion of any county shall be attached to any other county or part thereof so as to form a district." (See p. 23, Single Appendix)

Not only did the original North Dakota Constitution set out standards for legislative districting, Article VXIII, Section 214, of the North Dakota Constitution actually apportioned senatorial and representative districts. A review of the relevant portions of Section 214 reveals that within the limitation prohibiting attaching part of one county to all or part of another county, the original apportionment was designed to establish senate districts of equal population. Under Section 214, as many as four (4) counties were joined together to form a single senatorial district. Other counties were divided into as many as three (3) separate senatorial districts. Not satisfied that substantial equality had even then been achieved, the framers of Section 214 apportioned as many as three (3), and in one case four (4), representatives for certain legislative districts while limiting others to a single representative. The allocation of representatives among the legislative districts on this basis was designed to further compensate for unavoidable population imbalances among senatorial districts.

The 1960 North Dakota Constitutional Amendments pertaining to senate districting were designed to maintain the then status quo and were not primarily directed toward the preservation of districts on a county basis. After 1960 as before, certain senate districts constituted two or more entire counties while other counties continued to have at least two separate senate districts. Any connection between the pre-1965 system and a "little federal system" is beyond appellants' powers of observation.

In *Paulson I*, 232 F.Supp. 183, the United States District Court for the District of North Dakota purported to void Constitutional provisions that mandated single-member senatorial districts. In 1965, the same Court reapportioned the legislature under a plan that for the first time created several large multi-member senator districts. See *Paulson II*, 246 F.Supp. 36. In 1971, the North Dakota Supreme Court affirmed that neither

amended Section 29 of the North Dakota Constitution nor original Section Section 29 retained any vitality. *State ex rel. Stockman v. Anderson*, 184 N.W.2d 53.

Despite efforts at Constitutional revision and reform, the state Constitutional provisions voided under *Paulson I*, supra, have never been replaced. Putting aside historical considerations, the very most that can be said in support of multi-member senatorial districts is that at present they are not in conflict with any current provisions of the North Dakota Constitution. Of course, nothing in the state Constitution expressly or implicitly suggests that such districting advances any state policy.

Nor is there any statutory policy in North Dakota that supports a system of large multi-member senatorial districts for the state's urban areas. The majority opinion cannot be justified on the basis of implementing either a Constitutional or statutory state policy.

Indeed, in an historical context, the action of the District Court in *Paulson II*, supra, and the action of the majority of the Court in this case should properly be viewed as an unwarranted intrusion upon the long-standing legitimate North Dakota tradition of single-member senate districts. In this context, the Court's pronouncement that it will not intrude into the political realm is indeed ironic. What appellants ask is simply this: That in accordance with the traditions of North Dakota and the rule enunciated by this Court in *Connor v. Johnson*, supra, the reapportionment plan for the North Dakota Legislature provide for single-senator districts.

The majority opinion does not claim that multi-member senator districts advance any discernible state policy. The imposition of large multi-member districting has had a chaotic effect on the political process in North Dakota. In light of the political struggles over a ten (10) -year period relating to multiple-

member legislative districting, appellants ask what rule of law permits the District Court to remand the people of North Dakota to the "political realm" for relief from a system the Court itself, and not the political system, created?

In *Connor v. Johnson*, 402 U.S. 690, 692, this Court stated:

> "Where district courts are forced to fashion apportionment plans, single member districts are preferable to large multi-member districts as a general rule."

The rule is phrased in simple and understandable terms and ought not to be difficult to comprehend. It was re-emphasized in *Connor v. Williams*, 404 U.S. 549, 551. Contrary to the majority opinion below, its application is not restricted to cases of racial discrimination. The rule constitutes a superintending directive from this Court to District Courts applicable when, because of Constitutional infirmities in existing legislative apportionment plans, District Courts are required to invoke their equity powers in fashioning Constitutionally valid reapportionment plans.

The promulgation of such superintending direction through the issuance of guidelines to District Courts is a long-standing practice by this Court. See, for example, *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1 (1971).

The reasons for the rule are articulated in decisions such as *Lucas v. Forty-Fourth General Assembly of Colorado*, 377 U.S. 713, 731 (1964), and *Whitcomb v. Chavis*, 403 U.S. 124, 157-160 (1971), detailing the undesirable and inequitable features of large multi-member districts. As enumerated by Judge Bright in his dissent, a single-member senate district plan for North Dakota would correct a number of inequities observable in the Dobson Plan and its predecessor. (See *Chapman v. Meir*, 372 F. Supp. 371, 391 (1974))

The majority opinion seeks to justify imposition of the multiple-member district plan on the authority of decisions by this Court such as *Whitcomb v. Chavis*, supra, *Mahan v. Howell*, 410 U.S. 315 (1973), *White v. Register*, 412 U.S. 755 (1973), *Minnesota State Senate v. Beens*, 406 U.S. 187 (1972), and *Fortson v. Dorsey*, 375 U.S. 433 (1965). Not any of these cases are, in fact, supportive. The essential holding in *Fortson v. Dorsey*, supra, is that multi-member districts do not per se offend the Equal Protection Clause. That is not the issue here. Note also that in *Fortson*, supra, multiple member districts were established by Georgia law; and there is no comparable North Dakota state statute.

In *Whitcomb v. Chavis*, supra, the contention was that at-large election of senators and representatives for Marion County, Indiana, was Constitutionally impermissible. This Court, in sanctioning a statewide legislative reapportionment by the District Court, rejected the division of Marion County into single-member legislative districts on the basis that there was no showing that a county-wide district deprived persons of Constitutionally protected rights and because the Indiana State Constitution prohibited the division of a county for senatorial apportionment. As already emphasized, there is no comparable Constitutional provision in North Dakota, and thus no state Constitutional policy that would justify avoidance of the *Connor v. Johnson* rule. *Whitcomb* was issued four (4) days after *Connor*. They are not in conflict. *Connor* articulates a general rule, not an universal one. There are exceptions. *Whitcomb* identifies and defines one of these exceptions, namely that absent Constitutional grounds, a Court should not fashion a single-member district apportionment plan in the face of a contrary state Constitutional provision.

Mahan v. Howell, 410 U.S. 315, at 331-332 (1973), actually reaffirms the *Connor* rule. The decision states:

> "The [district] court conscientiously considered both the legislative policy and this court's admonition in Connor v.

> Johnson, supra, that in fashioning apportionment remedies, the use of single-member districts is preferred. But it was confronted with plausible evidence of substantial malapportionment with respect to military personnel * * * and the fear that too much delay would have seriously disrupted the fall 1971 elections. Facing as it did this singular combination of unique factors, we cannot say that the District Court abused its discretion in fashioning the interim remedy of combining the three districts into one multimember district."

Mahan thus recognizes that the rule requiring single-member legislative districts in Court-fashioned plans is a general one, subject to exception when unique circumstances are present. In *Mahan*, the combination of unique factors involved military personnel; and the majority opinion simply acknowledges that, under the particular situation, it was not a breach of discretion for the District Court to combine three districts into one multimember district.

Plaintiffs have indicated in their Jurisdictional Statement that some type of multi-member districts may be required with regard to the treatment of military personnel assigned to the Grand Forks Air Force Base and to the Minot Air Force Base. (See p. 12, Jurisdictional Statement). In contrast to the District Court in *Mahan*, the majority opinion below identifies no unique factors justifying formulation of large multi-member districts. The problem with regard to proper treatment of military personnel was not even mentioned by the majority and clearly does not warrant the imposition of the large multi-member districts fashioned by the Court.

White v. Register, supra, in no way supports the majority decision. *White* simply stands for the rule that state imposed multi-member districts cannot be maintained upon a showing that they result in a deprivation of Constitutionally protected rights.

Minnesota State Senate v. Beens, supra, holds that in fashioning an apportionment plan, District Courts must not only consider legitimate state Constitutional provisions (*Whitcomb*) but also applicable state statutory law. (In this instance, statutory provisions concerning the size of the legislature.) Of course, North Dakota has neither Constitutional nor statutory provisions that would provide an exception to *Conner*.

Appellants call attention to *Turner v. McKeithen*, 490 F.2d 191 (1973) and *Zimmer v. McKeithen*, 485 F.2d 1297 (1973). The question as to whether these cases represent appropriate applications of *White v. Register*, supra, is beyond the scope of the issues presented on this appeal. However, the decisions do reflect an appreciation by the Fifth Circuit that the Standard for Federal Courts in fashioning reapportionment plans is the equitable policy enunciated in *Connor v. Johnson*, supra. In *Zimmer*, supra, at 1307-1308, the Fifth Circuit observed:

> "We conclude our analysis in this case by returning to the point at which we began when we noted that this is not a case wherein a district court reapportionment plan approving at-large elections is challenged merely as an abuse of discretion. Where such a challenge is registered, our starting point would be Connor v. Johnson, supra, in which the Supreme Court announced that single-member districts are preferable to large multi-member districts. This preference is not, however, an unyielding one. As the Supreme Court admonished in Whitcomb v. Chavis, supra, 403 U.S. at 161, 91 S.Ct. at 1878, 29 L.Ed.2d 363, '[t]he remedial powers of an equity court must be adequate to the task, but they are not unlimited'. Lest our decision today be misconstrued to narrowly circumscribe the discretion of a district court in fashioning a reapportionment plan itself free from constitutional infirmity, we would note that the preference for single-member districts may yield in two situations.

"Where a district court determines that significant interest would be advanced by the use of multi-member districts and the use of single-member districts would jeopardize constitutional requirements, it can employ multi-member districts. See Mahan v. Howell, supra, 410 U.S. at 334-335, 93 S.Ct. 979, 35 L.Ed.2d 320. But these significant interests must not themselves be rooted in racial discrimination. Cf. Taylor v. McKeithen, supra, 407 U.S. at 194, 92 S.Ct. at 1982, 32 L.Ed.2d at 650, n. 3; White v. Weiser, 412 U.S. 783, 796, 93 S.Ct. 2348, 2355, 37 L.Ed.2d 335, 347 (1973).

"The preference may also yield where a district court determines that multi-member districts afford minorities a greater opportunity for participation in the political processes than do single-member districts. In the process of making such a determination, a court need not be oblivious to the existence and location of minority voting strength. While not required to formulate a plan that assures the success of a minority at the polls, a court may in its discretion opt for a multi-member plan which enhances the opportunity for participation in the political processes."

Note that since the District Court most assuredly did not impose large multi-member districts in North Dakota to advance the voting strength of minorities, the validity of the Fifth Circuit's second exception to the application of the equitable policy of single-member districting is not before the Court on this appeal.

In a footnote to *Taylor v. McKeithen*, 407 U.S. 191, at 194 (1972), this Court noted:

"3. Although similar in some respects, this case is not controlled by Whitcomb v. Chavis, 403 U.S. 124. To be sure, in both cases the District Courts were writing on clean slates in the sense that they were fashioning court-imposed reapportionment plans. And, in each case the equitable remedy of the court conflicted with a state policy. (There the state policy favored multi-member districts whereas there the policy favors maintenance of traditional boundaries.) The important difference, however, is that in Whitcomb it was conceded that the State's preference for multi-member districts was not rooted in racial discrimination, 403 US, at 149. Here, however, there has been no such concession and indeed, the District Court found a long 'history' of bias and franchise dilution in the State's traditional drawing of district lines. Cf. id., at 155."

Upon its Order of May 22, 1972 (pp. A-54-A-56, Appendix to Jurisdictional Statement), the United States District Court for the District of North Dakota had a "clean slate" upon which to fashion a reapportionment plan for the North Dakota Legislature. No state policy was in conflict with the equitable remedy of establishing single-member districts in accordance with *Connor v. Johnson*, supra. Since the majority opinion presents no justification for not providing the equitable remedy directed by this Court; and, in fact, there is no justification, the refusal to at least fashion single-member senate districts, constitutes an arbitrary breach of discretion by the District Court and requires a reversal of the Judgment entered by the Court pursuant to the majority opinion.

Population Variances Between Districts

Statistical information concerning the Dobson Plan discloses population disparities far beyond any heretofore sanctioned by this Court. On the basis of the 1970 census, the ideal senate district in North Dakota consists of 12,112 persons per senator. The maximum percentage variation between two (2) districts under the Dobson Plan is 20.14%—the Fourth District being under represented by 8.71%, and the Eleventh District being over represented by 11.43%. The population ratio between

these two (2) districts is 1.23-1. The average percentage variance under the plan is ± 5.07%. Seventeen (17) districts are over represented by an average of 6.03%. Twenty-one (21) districts are under represented by an average of 4.29%. Of the thirty-eight (38) districts created by the plan, twenty-four (24) exceed a 4% variance from the ideal. Fourteen (14) districts exceed a 6% variance, six (6) districts exceed 8%, and three (3) districts exceed a 10% variance from the ideal. See *Mahan v. Howell*, 410 U.S. 315, 319, for comparable data relating to the Virginia apportionment plan as enacted by the Virginia General Assembly. The Court-fashioned Dobson Plan for North Dakota presents variances substantially beyond those present in *Mahan*.

To understand the circumstances under which the Dobson Plan was first formulated, it is important to bear in mind that the District Court was under the gun as far as the 1972 primary and general elections were concerned. The *Paulson II* plan was not voided until May 22, 1972. Because the political process was already under way, the guidelines to the Special Masters were drawn so as to minimize the impact of redistricting on the upcoming 1972 elections. Accordingly, the Commission was directed ". . . to try to conform new legislative districts to the existing districts" (p. A-55, Appendix to Jurisdictional Statement). Bearing in mind that population disparities formed the basis for the Order for reapportionment, except for the peculiar circumstance of the proximity of the 1972 elections, such a guideline would be both contradictory and self-defeating. That the guideline was followed by Special Master Dobson is reflected by his report, which in pertinent part states:

> "The proposed districts conform, both in boundaries and in numbering, quite closely to the existing districts." (p. A3, Appendix to Motion to Affirm)

Infirmities in the Dobson Plan led a majority of the District Court to adopt it on an interim basis for the 1972 election only. The majority said:

> "We approve the Dobson Plan of reapportionment at this time for the 1972 election only. This court retains jurisdiction of this cause for the purpose of adopting a different plan of reapportionment which will not be hampered by considerations of impending elections." *Chapman v. Meier*, 372 F.Supp. 363, 367.

The Court directed the Special Masters to conduct a study to develop a permanent apportionment plan. Concerning that study, the Court stated:

> "The guiding principle of this study, of course, will be the requirements of equal representation mandated by the Fourteenth Amendment to the United States Constitution." *Chapman v. Meier*, 372 F.Supp. 363, 368.

Plaintiffs do not have any quarrel with the original guidelines of the Commission relating to making no substantial changes in the size of the legislature, observing natural geographical barriers, and observing political subdivision lines (p. A-55, Appendix to Jurisdictional Statement). Nor do plaintiffs dispute the additional guidelines set out in the Decision of June 30, 1972, as follows:

> "The Special Masters should give additional consideration to creating legislative districts along the lines suggested in the Ostenson Plan, the boundaries of which should remain as compact as possible while taking into account ease of travel within each district, as well as the substantial identity of economic and social interests among its inhabitants." *Chapman v. Meier*, 372 F.Supp. 363, 367-368.

While all of these guidelines and directives appear appropriate to the work of the Commission, no one of them reflects any statutory or Constitutional state policy. Thus, neither the North Dakota Constitution nor the North Dakota Century Code fixes the size of the legislature or purports to secure the preservation

of political subdivision lines in legislative districting. Accordingly, none of these guidelines are available to the District Court as justification for adoption of the Dobson Plan with its large population disparities among legislative districts. The Decision of January 30, 1974, seeks to justify population variance under the Dobson Plan in these terms:

> "One of the unique features existing in North Dakota is the Missouri River, which separates the state into two parts—two-thirds to the east and one-third to the west. The river traversing the state is crossed by only six highway bridges, four of them located in the area of Williston and Bismarck. This geographical reality, coupled with the difficulty of achieving the goals of observing geographical boundaries and existing political subdivisions, adds to the difficulty of minimizing the variance. That it was substantially accomplished, as illustrated by the chart made a part of this opinion, attests to the validity and soundness of the plan. The population variance between the districts in most cases is only a few hundred people. As a general rule, deviations from the average population decreases if many county lines are violated, and increases if few are split. The effort to preserve urban-rural identities and county lines intact produce the variations which look large percentage wise, but when applied to a sparsely populated state do not result in significant population variances." 372 F.Supp. 371, 377.

In *Mahan v. Howell*, 410 U.S. 315, Virginia was able to justify population variances between districts by directing attention to Virginia Constitutional and statutory provisions establishing state policies relating to the preservation of geographic boundaries and existing political subdivisions. The majority's attempt to justify the Dobson Plan disparities on the basis of *Mahan* ignores the essential distinction that in contrast to Virginia, the State of North Dakota has no Constitutional or statutory policy of preserving geographical boundaries and existing political subdivisions.

The District Court contends that the Missouri River is a major cause of population variance. Concerning the river, Special Master Dobson reported only:

> "The plan observes natural geographic barriers, such as the Missouri River." (p. A4, Appendix to Motion to Affirm)

As a geographic barrier, the Missouri River separates approximately the southwest one-third from the rest of North Dakota. For convenience, legislative districts west and south of the Missouri will be identified as "West River" districts. Under the Dobson Plan, the West River districts are seven (7) in number and are identified as Districts 33 through 39. The number of senators from these districts is seven (7) out of a statewide total of fifty-one (51). The average percentage variance for West River districts from the ideal senate district is ± 4.19% as compared to a ± 5.07 average percentage variance statewide. Neither the most over represented nor the most under represented district included in the Dobson Plan is situated west of the river.

That the Missouri River presents no obstacle whatsoever to fashioning legislative districts of almost mathematical equality is amply demonstrated by the report of Special Master Ostenson accompanying his plan. In pertinent part, the report states:

> "A legislative redistricting plan for North Dakota is submitted herewith for the Court's consideration. Some of the important features of this redistricting plan and the criteria used are as follows:
>
> "(1) The natural boundary imposed by the Missouri River should be recognized and any proposed legislative district should not cross the river.
>
> "(2) The magnitude of the deviation of a district population, above or below the state average, should be kept at a minimum.

"(3) Legislative district boundaries should coincide with political subdivision boundaries to facilitate the work of election officials at election time.

"(4) District compactness and avoiding elongated districts should be considered.

"When criteria one and two above were studied, it became apparent that the number of solutions that could be suggested would be limited. According to the United States Census, there were 86,184 people west and south of the Missouri River in 1970 and 531,577 people east and north of the Missouri River. The total state population was 617,761. Accordingly, the number of legislators in a plan that most nearly equalizes legislative representation statewide is 43 senators and 86 representatives.

"Additional solutions are 50 senators and 100 representatives; or 36 senators and 72 representatives. These three solutions would make it possible to keep the average number of people per senator on both sides of the river at a uniform level.

No. of Senators	50[a]	43[b]	36[c]
Average (West)	12,312	14,364	17,236
Average (East)	12,362	14,367	17,147
Statewide Average	12,355	14,366.5	17,160

"[a] Seven senators west of the Missouri River and forty-three senators east of the river.

"[b] Six senators west of the Missouri River and thirty-seven senators east of the river.

"[c] Five senators west of the Missouri River and thirty-one senators east of the river."

(pp. 12-13, Single Appendix)

Further illustrating that the Missouri River provides no barrier to fashioning legislative districts of equal population, the plan passed by the 1973 North Dakota Legislature, but rejected by a vote of the people, called for fifty (50) state senators, including seven (7) from West River districts. The maximum percentage variation from the ideal as far as West River districts was concerned under the rejected legislative plan was 6.8% —District 31 being under represented by 3.3%, and District 33 being over represented by 3.5%. The average percentage variance under this plan for West River districts was only 1.4%. (See p. A20, Appendix to Motion to Affirm).

To be sure, the Missouri River is a physical barrier of substantial proportion. However, this Court need not determine whether a substantial physical barrier provides independent justification for population variances under a Court-fashioned reapportionment plan. The Court need not resolve the question because as demonstrated by the foregoing, the Missouri River presents no barrier at all to designing legislative districts throughout North Dakota of almost exact mathematical equality.

The report transmitting the Dobson Plan to the District Court contained the following observation:

"In its order of May 22, 1972, the Court did not address itself to the matter of population deviation. However, I feel that anything in the neighborhood of 1.25-1 is constitutionally permissible in a rural state like North Dakota. It results, in most districts, in a deviation of only a few hundred persons from the mean. Such a ratio probably would be excessive in a large urban state because it would result in deviations running into tens of thousands." (p. A5, Appendix to Motion to Affirm)

That a majority of the Court below ultimately came to accept Mr. Dobson's observation about the relative unimportance of population disparities among legislative districts in rural states

is demonstrated by the following statement in the majority Opinion of January 30, 1974:

> "Where there are identifiable minorities or political groups being forced out of the election process *and* their voting strength is *invidiously* weakened, a plan proper in other respects may require a further examination. As we view the cases, deviations of 16%, 8%, and 10% have recently been allowed in heavily populated states having significant minority populations.
>
> "Even greater deviations are permissible in a sparsely settled state barren of electorally victimized minorities." (Author's Emphasis) *Chapman v. Meier*, 372 F.Supp. 371, 379.

Plaintiffs note that the assertion that deviations among districts may be greater in a sparsely settled state is unaccompanied by citation. In states with relatively small populations, it can be fairly argued that an individual's vote is of greater significance in terms of affecting the outcome of an election than the individual who casts his ballot in a large metropolitan state or district. The Equal Protection Clause principle of "one man, one vote" ought to be equally available to citizens of North Dakota and of New York. While the numbers of people affected by malapportionment in North Dakota may not seem large on a comparative basis, the Court was not dealing with such small numbers of citizens that the shifting of a handful would significantly alter the percentage of population deviation between legislative districts under the Court-fashioned plan.

Nor is the majority's unconcern for variances in a sparsely settled state the only point upon which it can rightfully be faulted. As reflected by the above quotation, the Court also insists that in the absence of electorally victimized minorities, population disparities are not important. That thesis represents a fundamental misconception of the "one man, one vote" principle enunciated in *Reynolds v. Sims*, 377 U.S. 533, and subsequent cases. The basic purpose of the rule is to assure that the voting majority will not be victimized by a minority whose votes are accorded greater weight.

The majority's reliance on *Mahan v. Howell*, 410 U.S. 315; *White v. Register*, 412 U.S. 755; *Gaffney v. Cummings*, 412 U.S. 735, and *Swann v. Adams*, 385 U.S. 440 (1967), is entirely misplaced. The population disparities among districts under the Dobson Plan are substantially beyond any heretofore approved and are per se violative of the Equal Protection Clause. In contrast to the cited decisions of this Court, population disparities are not justified on the basis of any unique factors, such as geographic barriers or any discernible policy of the State of North Dakota, Constitutional or statutory. In the absence of such justification, the District Court was obligated to fashion a reapportionment plan upon the standard of a good-faith effort to achieve absolute population equality among the legislative districts.

CONCLUSION

On the basis that the issue of multi-member districts or single-member districts was clearly political, the District Court denied plaintiffs the equitable remedy of single-member districting required under the rule established by *Connor v. Johnson*, 402 U.S. 690. Speaking for the majority in *Gaffney v. Cummings*, 412 U.S. 735, Mr. Justice White observed:

> "The very essence of districting is to produce a different—a more 'politically fair'—result than would be reached with elections at large, in which the winning party would take 100% of the legislative seats. Politics and political considerations are inseparable from districting and apportionment."

The political ramifications of reapportionment are inescapable whether accomplished by a legislature, commission, or Court. It is a fiction that by denying plaintiffs the "politically fair" remedy of single-member districts, the Court has avoided the political realm. All that it has done is to continue an unjust and unequal system which was originally designed by the Court itself and not by the politicians or the people of North Dakota.

The population deviations among the legislative districts created by the District Court exceed tolerable limits. The Dobson Plan per se offends the Equal Protection Clause. Further, the deviations are not justified by any unique factors, geographic barriers, or any discernible state policy. In lieu of the guiding principle of equal protection, the guiding principle for the Dobson Plan involved the formulation of legislative districts conforming as much as possible to existing districts. Since the existing districts were the creation of the District Court in *Paulson II* back in 1965, and considering that the necessity for redistricting was population disparities revealed by the 1970 census, the "guiding principle" of conforming the new to the old only maintains Constitutionally invalid population disparities among North Dakota legislative districts.

Plaintiffs ask for a reversal of the Judgment rendered January 30, 1974. The case should be remanded to the District Court with directions to fashion a legislative apportionment plan assuring equal representation and providing for single-member senator districts.

Respectfully submitted

JOHN D. KELLY
609½ First Avenue North
Post Office Box 1389
Fargo, North Dakota 58102
Counsel for Appellants